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The Honorable Stewart M. Bernstein
Chapter 11
Hearing Date: February 16, 2001
Hearing Time: 10:00 A.M.
Hearing Location: New York
Response due date:

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE:

Case No: 00-41065 (SMB)

WHITEHALL FAMILY GOLF CENTERS, INC

Debtor.

AIRENA INC. OBJECTION
TO SALE OF PROPERTY
AUCTION SALE #233
MLB ID # OH8

**MEMORANDUM OF LAW
ON BEHALF OF AIRENA, INC.**

INTRODUCTION

Airena, Inc., by its attorneys, Bartlett, McDonough, Bastone & Monaghan, LLP, objects to the sale of property # 233 to the City of Whitehall, Ohio. Airena respectfully submits that the debtor was not in possession of legal title to property #233 at the time of the filing of its petition. Accordingly, same is not properly property of the debtor's estate as defined by 11 U.S.C. §541 and the case law interpreting that section.

BACKGROUND INFORMATION

On June 25, 1998, the debtor contracted with Airena, for the construction of a fully equipped and operational tennis dome upon property #233. In consideration for the materials, construction and installation of the dome, the debtor was to make installment payments of the complete purchase price of Five Hundred Ninety-Nine Thousand Six Hundred Dollars (\$599,600.00). Each installment

was to be paid upon the completion of a designated element of the construction by Airena. (*See*, Paragraph 11 of the contract, a copy of which is annexed hereto as Exhibit A.)

Upon information and belief, Airena has fully complied with all of its obligations under the construction contract. As of the date of the filing of the petition, however, the debtor had failed to tender to Airena the full purchase price of the construction pursuant to its contractual obligation. Presently, the outstanding balance plus interest amounts to Fifty-Four Thousand Five Hundred Six Dollars and Sixty-One Cents (\$54,506.61). This amount comprises the following debts owed:

- \$3,000.00 down payment with contract
- 30% less above down payment, with order to manufacture
- 40% upon completion of manufacture
- 25% upon completion of installation
- 5% due 30 days after installation

Note: A late payment penalty of 1.5% per month shall apply on all account balances over 30 days past due.

At paragraph 10, the contract specifically states:

TITLE: Title to the dome and equipment shall pass to the Buyer after the terms and conditions of this contract and any addendums have been fully met, including item 11 [PURCHASE PRICE].” (Emphasis and inserts added.) (*See*, Exhibit A.)

The plain meaning of the contractual language indicates that since the debtor had not tendered the entirety of the purchase price to Airena prior to the filing of the debtor’s petition, the debtor did not have title to the dome and equipment at that time. Accordingly, Airena respectfully submits that as of its filing, the debtor had not obtained legal title to the property. Thus, the same is not properly “property of the estate” pursuant to 11 U.S.C. §541.

A. The Law Governing the Contract Binds the Parties to Its Plain Meaning

By its express terms, the contract for the erection of the tennis dome by Airena upon property #233 dictates that its interpretation shall be governed by the law of the State of Minnesota. (*See*, Exhibit A at Paragraph 16.) Minnesota statutorily requires that contracts are subject to the “plain and usual meaning” of their stated terms. Minn. Stat. 645.08(1) (1996). The rule was elaborated upon by the Minnesota Court of Appeals in Mauer v Kircher, 587 N.W.2d 512 (Minn. Ct. App. 1999):

In the absence of ambiguity, courts are bound to attribute the usual and accepted meaning to contractual language. *See*, Minn.Stat. 645.08(1) (1996) (stating words and phrases must be construed according to common and approved usage); *Carl Bolander & Sons, Inc. v. United Stockyards Corp.*, 298 Minn. 428, 215 N.W.2d 473, 476 (1974) (noting, where language may be interpreted according to its plain meaning there is no room for construction.

The meaning of Paragraph 10 of the Airena contract is plain, “Title to the dome and equipment shall pass to the Buyer [debtor] after the terms and conditions of this contract and any addendums have been fully met (including item11). Since the debtor failed to make all payments pursuant to the contract, title never passed to it.

B. Without Title, the #233 Is Not Property of the Estate Pursuant to Bankruptcy Rule §541

In interpreting Section 541 of the Bankruptcy Code, the Courts have held to the principle that “the trustee does not succeed to any greater interest [in a property] than that held by the debtor.” Chemical Bank v. Dana, 234 B.R. 585 (Bankr. Dist. Conn. 1999). This rule was explained in Matter of Sanders, 969 F.2d 591 (7th Cir. Ill. 1992), where the Court held that there is a:

[B]asic tenet of bankruptcy law that a trustee succeeds only to the title and rights in a property that the debtor had at the time she filed her bankruptcy petition. 11 U.S.C. §541; In re Schauer, 835 F.2d 1222, 1225 (8th Cir. 1987); Groves, 120 B.R. at 965. Filing a bankruptcy petition does not expand or change a debtor's interest in an asset; it merely changes the party who holds the interest. *See*, Silldorff, 96 B.R. at 866.

More recent case law upholds this interpretation of 11 U.S.C. §541. In Gaudette v. Gaudette, 241 B.R. 491 (Bankr. Dist. N.H. 1999), the Bankruptcy Court set forth that “the legislative history of [§541] indicates that it was not intended to expand the debtor's rights against others more than they exist at the commencement of the case.”

This Court's approval of the proposed sale of property #233 would necessarily controvert this rule by “expanding” the debtor's rights against Airena, allowing the debtor's estate to transfer title which belongs solely to Airena until the debtor's obligation under the contract is satisfied.

Further, in In re Borison, 226 B.R. 779, 785 (Bankr. S.D.N.Y. 1998), this Court reinforced the limits upon what properties are properly included in a debtor's estate pursuant to §541, stating that “the Trustees can have no greater rights in the property than Borison and the Business Debtors had on the date the cases were commenced.” Here too, the debtor has no greater interest in property #233 than that which it had on the date of its filing, *i.e.*, an interest lacking legal title. Accordingly, the estate is without capacity to transfer title to the City of Whitehall, or any other bidder absent the fulfillment of its contractual obligation to Airena.

CONCLUSION

Wherefore, for all of the foregoing reasons, it is respectfully submitted that this Court disapprove the proposed sale of property #233, or in the alternative, that it condition the approval upon the fulfillment of the debtor's obligation to Airena, such that title may transfer to the City of Whitehall free from encumbrances.

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